SUPREME COURT, U.S.
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No. 02-1368

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

CAROLINA FEED MILLS, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit Court of Appeals properly affirmed the district court's grant of summary judgment to Carolina Feed Mills, Inc. when CSX failed to commence the action within the applicable South Carolina statute of limitations.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the case caption; however, the proper name of the Respondent is "Carolina Feed Mills, Inc." There is no parent or publicly held company owning 10% or more of the Respondent's stock.

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STATUTORY PROVISIONS INVOLVED

South Carolina Rule of Civil Procedure 3(a): A civil action is commenced by filing and service of a summons and complaint.

STATEMENT OF THE CASE

This appeal arises from a negligence action to recover property damages, brought by CSX in the United States District Court for the District of South Carolina under diversity jurisdiction, and thus governed by state law. The issue on appeal is simply whether the Fourth Circuit properly affirmed the district court's finding that CSX failed to

commence the action within the applicable South Carolina statute of limitations. (*See* Pet. at 2-3.) There is no federal question, nor is there a compelling issue of national importance. Both lower courts properly found that the South Carolina rule of law CSX claims applies to this case is inapplicable. (*See* Pet. App. at 1a, 6a.) CSX never petitioned to certify this question to the South Carolina Supreme Court, nor did CSX petition for a rehearing by the Fourth Circuit. Instead, CSX comes directly to this Court for a review of the lower court's grant of summary judgment. (*See* Pet. at i.)

In district court, Carolina Feed Mills moved for summary judgment on the grounds that CSX failed to commence the action within the applicable South Carolina statute of limitations. *See Walker v. Armco Steel Corp.*, 446 U.S. 740 (1978) (state law on commencement of an action for purposes of the statute of limitations applies when in federal court under diversity jurisdiction). Under South Carolina law, an action is deemed "commenced" for purposes of the statute of limitations when the summons and complaint are filed with the court *and* served upon the defendant. *See* S.C.R. Civ. P. 3(a).[1] Here, while the summons and complaint were filed in time, there was no question that CSX failed to serve Carolina Feed Mills before the limitations period expired.[2] (*See* Pet.

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[1] Under the recent amendment of a South Carolina statute (not applicable to this case, *see* Pet. App. at 4a-5a, n.*), an action now may be deemed commenced upon filing *if* actual service is accomplished within 120 days thereafter. *See* S.C. Code Ann. § 15-3-20 (Law. Co-op. Supp. 2002).

[2] Three months before the limitations period expired, counsel for Carolina Feed agreed to waive formal service and asked CSX to serve counsel rather than formally serving Carolina Feed. Then, two months before the expiration, counsel for Carolina Feed sent a letter reminding counsel for CSX that he had agreed to accept service and that he was "waiting on service of the complaint." (*See* Pet. App. at 3a.) Nevertheless, counsel for CSX did not serve the summons and complaint until after the limitations period expired. (*See id.*)

App. at 3a-4a, 9a.) Consequently, Carolina Feed asserted the statute of limitations defense and moved for summary judgment. (*See id.* at 4a.)

In opposition to summary judgment, CSX argued that Carolina Feed's waiver of formal service of the summons had also waived its statute of limitations defense.[3] (*See* Pet. at 3.) CSX maintained that, in South Carolina, any defendant asserting a limitations defense based on the failure to serve within the statute of limitations must also assert a Rule 12 insufficient service of process defense.[4] (*See id.* (citing *Garner v. Houck*, 435 S.E.2d 847 (S.C. 1993); *Unisun Ins. v. Hawkins*, 537 S.E.2d 559 (S.C. Ct. App. 2000), *cert.*

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[3] Counsel for Carolina Feed signed a notice of lawsuit and request for waiver of summons, which had been provided by CSX. (*See* Pet. App. at 4a.) *See* Fed. R. Civ. P. 4(d) (imposing duty to save costs by waiving formal service). The waiver explicitly waived only defenses based on insufficiency of service of process: Carolina Feed's counsel "agree[d]to save the cost of service of a summons and . . . complaint by not requiring that Carolina Feed Mills, Inc. be served with judicial process. Carolina Feed Mills, Inc. . . . will retain all defenses . . . except for objections based on a defect in the summons or in the service of the summons." (*See id.* at 8a.)

[4] CSX is asking this Court to adopt a South Carolina rule of law with several illogical results. First, South Carolina's statute of limitations defense would melt into its insufficiency of service of process defense—the limitations defense would never stand alone as a separate defense. Secondly (and nonsensically), under CSX's argument, a defendant must assert an insufficient service of process defense even if service fully complied with Rule 4. Just as in this case, Carolina Feed waived formal service under Rule 4, yet CSX argues Carolina Feed nevertheless should have raised insufficient service as a defense. Moreover, a waiver of formal service under CSX's rule would mean that a plaintiff need not serve at all—accepting CSX's argument would mean that CSX could have waited a full year past the limitations deadline, or even never serve Carolina Feed at all. Finally, such a ruling would have a chilling effect on practitioners agreeing to waive formal service in an effort to save costs. *See* Fed. R. Civ. P. 4(d) (imposing duty to save costs by waiving formal service).

dismissed, 564 S.E.2d 676 (S.C. 2002).) *See* Fed. R. Civ. P. 12(b)(5) (defense of "insufficiency of service of process"). Initially, the district court denied summary judgment because of an erroneous affidavit submitted by counsel for CSX. (*See* Pet. App. at 6a-7a.) The erroneous affidavit contained an error in the date of the incident which gave rise to the claims, thus making it appear that CSX had commenced the action within the limitations period.[5] (*See id.*) When counsel for CSX corrected the affidavit, showing the actual date the incident occurred, the district court reversed its previous order and granted summary judgment to Carolina Feed. (*See id.*)

On appeal, the Fourth Circuit affirmed and adopted the reasoning in the district court's opinion, including a finding that CSX failed to commence the action within the South Carolina statute of limitations and that Carolina Feed's waiver of sufficiency of service had no effect on its limitations defense. (*See id.* at 5a.) Furthermore, the district court specifically had found that CSX's reliance on South Carolina case law holding that a waiver of the service of process defense also waives the limitations defense was "misplaced" and not applicable to this case. (*See id.* at 9a.) The district court had properly distinguished between cases, such as this one, where there was late but proper service (and thus no Rule 4 defect), from cases where the limitations defense is based solely on a Rule 4 defect in service. (*See id.*) Only in the latter instance, when a statute of limitations defense depends upon showing insufficient service of process, is the Rule 12(b)(5) defense of insufficiency of

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[5] The Petition omits any reference to the fact that the sole basis for the district court's initial denial of summary judgment to Carolina Feed was the erroneous date in CSX's counsel's affidavit. (*See* Pet. at 2.) Carolina Feed wishes to note this omission in an effort to avoid the Court's drawing from the Petition any inference that the district court arbitrarily "chang[ed] its mind and revers[ed] itself on the issue of waiver." (*See* Pet. at 2, 7.)

service critical to the limitations defense. *See Garner* at 850; *Unisun* at 561. Carolina Feed's limitations defense was based only on late service, not on insufficient service; therefore, there was no need for Carolina Feed to preserve its insufficiency of service of process defense. (*See* Pet. App. at 9a.)

REASONS FOR DENYING THE WRIT

I. THE SUPREME COURT SHOULD DENY CSX'S PETITION FOR A WRIT FOR CERTIORARI BECAUSE THERE IS NO COMPELLING REASON FOR THIS COURT TO DECIDE A MATTER OF SOUTH CAROLINA LAW.

CSX presents absolutely no reason for this Court to grant a writ of certiorari. *See* Sup. Ct. R. 10 (basis for petition must be "compelling" for Court to exercise its discretion). The entire basis for CSX's Petition is: "The district court and the court of appeals erred as a matter of law." (*See* Pet. at 2. *See also id.* at i (Question Presented is whether the lower courts erred in concluding Carolina Feed did not waive its statute of limitations defense).) And, as the Supreme Court Rules clearly state, a "petition . . . is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." *See* Sup. Ct. R. 10. As shown in the following section, the lower courts properly stated the controlling rule of South Carolina law, and properly applied the law to the facts of this case. Finally, CSX does not argue—nor could it—that there is any "rare" circumstance justifying this Court's grant of a petition for writ of certiorari or any other compelling reason, such as those set out in Supreme Court Rule 10. *See id.* Consequently, this Court should deny the petition.

II. THE SUPREME COURT SHOULD DENY CSX'S PETITION FOR A WRIT OF CERTIORARI BECAUSE THE FOURTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S APPLICATION OF SOUTH CAROLINA LAW.

CSX simply failed to commence this action within the South Carolina statute of limitations. *See Walker v. Armco Steel*, 446 U.S. 740 (when in federal court on diversity jurisdiction, state law determines when an action is commenced for purposes of tolling the statute of limitations). In South Carolina, the statute of limitations is tolled when an action is commenced by filing *and* actual service of the summons and complaint. *See Blyth v. Marcus*, 470 S.E.2d 389, 390 (S.C. Ct. App. 1996); S.C.R. Civ. P. 3(a). There is no question that CSX did file within the limitations period, and there is no question that CSX *did not* serve the summons and complaint until after the limitations period expired. (*See* Pet. App. at 3a-4a.) Carolina Feed clearly waived formal service of process under Rule 4 and has no basis to claim that service of process was insufficient;[6] therefore, Carolina Feed had no 12(b)(5) insufficient service of process defense to assert. Nevertheless, CSX argues that Carolina Feed should have asserted this defense in order to be entitled to its statute of limitations defense. (*See* Pet. at 3.)

CSX incorrectly claims that, under South Carolina law, the insufficient service of process defense and the statute of limitations defense are "'inextricably tied'" together, and any "defendant asserting a limitations defense must also assert . . . service of process defenses where limitations allegedly

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[6] Obviously, a waiver of formal service does not mean that service is waived altogether. The plaintiff still must provide the filed summons and complaint to counsel for the defendant, along with a notice and waiver of service form. *See* Fed. R. Civ. 4(d)(2). Then, counsel for the defendant must sign the waiver and return it to the plaintiff for filing. *Only when the waiver is filed is the action deemed "served." See id.* at 4(d)(4).

expired due to untimely service." (*See id.* at 2-3, 5 (citing *Garner* at 850; *Unisun* at 561).) CSX argues a misapplication of the *Garner*[7] and *Unisun*[8] decisions in an attempt to bootstrap the issue of sufficiency of service of process into this case. Both cases involved insufficient attempts at service, and insufficient service was the defendants' only basis for claiming the plaintiffs were "untimely" in commencing the actions prior to the expiration of the statute of limitations. *See Garner* at 850; *Unisun* at 560. Even CSX's Petition highlights this fact, stating the two cases involve

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[7] The Petition fails to include the material facts of *Garner* which illustrate the decision's inapplicability to this case. (*See* Pet. at 3.) There, the plaintiff attempted to commence the action by delivering the summons and complaint to the sheriff. *See Garner* at 848. Delivery of the summons and complaint to the sheriff of the county where the defendant "usually or last resided" is the equivalent of commencing the action for purposes of tolling the statute of limitations, *provided* that actual service is then accomplished within a reasonable time thereafter. *See* S.C.R. Civ. P. 3(b). The court found that the action was commenced by the delivery of the summons and complaint to the sheriff; however, the defendants argued the sheriff had never properly perfected service because he served the wrong person, and thus the action had not been "commenced." *See Garner* at 848, 850. Because the defendants had failed to raise insufficient service of process as a defense in their answer, the court found that they could not assert insufficient service as the basis for their statute of limitations defense. *See id.* at 850.

[8] Both the district court and the Fourth Circuit specifically held that *Unisun* was inapplicable to this case; however, CSX's Petition fails to provide the material facts necessary to understand the context of the South Carolina Court of Appeal's holding in *Unisun* and why it does not apply. (*See* Pet. at 3-4; Pet. App. at 5a, 9a.) There, the plaintiff filed the complaint and attempted service on one of the defendants *prior to* the expiration of the limitations period. *See Unisun* at 560. Although the attempted service was improper, the defendant failed to raise insufficiency of service of process as a defense. When the defendant moved for summary judgment, claiming the plaintiff had failed to commence the action within the statute of limitations, the court found that the failure to raise the insufficiency of service defense had resulted in a waiver of the statute of limitations defense based on insufficiency of service. *See id.* at 561.

"the assertion of [a] statute of limitations defense *which is based on inadequate service of process.*" (*See* Pet. at 3 (emphasis added).)

Contrary to CSX's argument, "untimely" service is not *always* "insufficient service of process under Rule 12(b)(5)." (*See id.* at 6.) It is true that, when attempted service fails and results in the failure to timely commence the action prior to the expiration of the limitations period, a defendant must plead both defenses. *See Garner* at 850; *Unisun* at 561. In that limited circumstance, the limitations defense only succeeds if the attempted service is deemed insufficient under Rule 4, and thus the limitations defense depends on the viability of the sufficiency of service defense. *Nevertheless, that rule of law does not apply to this case.*[9] Here, there is no Rule 4 defect in service of process; thus, obviously, insufficient service of process is not the basis for Carolina

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[9] Similarly, CSX cites three federal cases which, like *Garner* and *Unisun*, are inapplicable here because they deal with insufficient service of process. (*See* Pet. at 6 (citing *Eastern Refractories Co. v. Forty Eight Insulations, Inc.*, 157 F.3d 169 (2nd Cir. 1998); *Jones v. St. Tammany Parish Jail*, 4 F. Supp. 2d 606 (E.D. La. 1998); *Hoffman v. Benson*, 147 F.R.D. 205 (W.D.Mo. 1993).) All three cases involve "untimely," and thus insufficient, service under Federal Rule of Civil Procedure 4. *See id. See also* Fed. R. Civ. P. 4(m). Federal Rule 4 requires service within 120 days of filing the complaint, and the "timeliness" issue in those cases relates only to service under that Rule 4 requirement. *Compare id. with* S.C.R. Civ. P. 3(a), 4 (South Carolina Rules contain no provision allowing for actual service 120 days later. Actual service must be accomplished before the action is "commenced."). Any statute of limitations defense in those cases arose only as a result of a Rule 4 timeliness defect—none of the cases deal with *sufficient* but "untimely" service solely for purposes of the statute of limitations. *See Eastern Refractories* at 173; *Jones* at 610, 610 n.2; *Hoffman* at 206-07. Indeed, counsel for Carolina Feed is unable to find any case in any state (much less in South Carolina) to support the blanket rule urged by CSX that all waivers of formal service under Rule 4 also waive all statute of limitations defenses.

Feed's statute of limitations claim. Consequently, "untimely" service in this case is purely a statute of limitations issue.

Carolina Feed's limitations defense is based solely on late service—CSX made *no attempt* at service prior to the expiration of the limitations period. Because there is no issue of inadequate service of process here, *Garner* and *Unisun* do not apply and it is irrelevant that Carolina Feed waived the sufficiency of service of process defense. Both the Fourth Circuit and the district court recognized this important factual difference between this case and the South Carolina case law relied upon by CSX. For this reason, the Fourth Circuit correctly affirmed the district court's grant of summary judgment to Carolina Feed. As a result, there is no reason for this Court to review the lower courts' application of South Carolina law to the facts of this case, and the Court should deny CSX's petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Court should deny CSX's petition for a writ of certiorari.

Respectfully submitted,

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